Supreme Court, U.S.
FILED
JAN 11 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-827

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

PORTEC, INC.,

Petitioner,

v.

THE POST OFFICE, INC.,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALAN EPSTEIN
BRUCE A. MENK
of HALL & EVANS
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys for Petitioner

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I. ARGUMENT

A. Whether the Colorado Punitive Damages Statute Which was Applicable to this Case is Unconstitutional in Violation of the Due Process Clause of the United States Constitution

Initially, the Post Office contends that Portec did not comply with Local Rule 406(B) regarding notification to the attorney general of the state of Colorado of a claim of unconstitutionality. This contention is an apparent oversight of the fact Portec did notify the attorney general of its claim that §13-21-102, C.R.S. violated its due process rights. (Exhibit A) And, the attorney general responded and indicated that it did not intend to intervene in the action. (Exhibit B)

The Post Office then argues that certiorari should not be granted since the Colorado legislature amended §13-21-102 to impose specific limitations on punitive damages awards. Notwithstanding this legislative change, however, the due process rights of defendant and the due process rights of all litigants involved in cases filed before July 1, 1986 are affected by the statute at issue. Therefore, certiorari review is appropriate. *See* Sup. Ct. R. 10(1)(c).

Finally, the Post Office argues that due process has been afforded Portec since the Tenth Circuit Court of Appeals ordered a remittitur. A similar argument is being advanced by the plaintiff in *Pacific Mutual Life Ins. Co. v. Haslip*, ____ U.S. ____, 110 S. Ct. 1780, 108 L.Ed.2d 782 (1990), currently at issue before this Court. There, the plaintiff is arguing that the "*Hammond* review process" announced by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) provided sufficient due process to a defendant by requiring the trial court to apply certain criteria to review each punitive damage award entered by a jury. Pacific Mutual is advancing the argument that this "*Hammond* review" procedure is inadequate to comply with

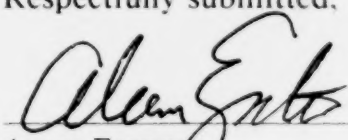
the due process requirements of the United States Constitution. Similarly, it is Portec's contention that the review process involved in permitting an appellate court to gauge whether a verdict is "excessive," while better than no review at all, is still inadequate to meet the requirements of the due process clause. Again, the punitive damage award, even after being reduced by one million dollars, is still more than twice the amount permitted by the Colorado punitive damages statute in its current form.

II. CONCLUSION

For the reasons stated herein, and for the reasons more fully set forth in Portec's petition for writ of certiorari, Portec requests this Court grant its petition for writ of certiorari.

Dated this 11 day of January, 1991.

Respectfully submitted,



ALAN EPSTEIN
BRUCE A. MENK
of HALL & EVANS
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 11 day of January, 1991 a true and correct copy of the foregoing REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Alan G. Carlson, Esq.
Daniel W. McDonald, Esq.
MERCHANT, GOULD, SMITH, EDELL,
WELTER & SCHMIDT, P.A.
3100 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402

Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

88 SEP 29 P2: 39

JAMES R. MANSPEAKER,
CLERK
BY_____DEP. CLK.

THE POST OFFICE,

Plaintiff,

vs.

PORTEC, INC.,

Defendant.

Civil Action
No. 87-FS-681

NOTIFICATION OF CLAIM OF UNCONSTITUTIONALITY

COMES NOW defendant, Portec, Inc., by and through its attorneys, HALL & EVANS, and, pursuant to local Rule 406(B) herewith submits the following notification of claim of unconstitutionality.

1. Defendant, Portec, Inc., in its motion for judgment notwithstanding the verdict, hereby challenges the constitutionality of Section 13-21-102, C.R.S., prior to its amendment effective July 1, 1986. *See Colo. Sess. Laws 86*, p. 675, §1.

Respectfully submitted,

Bruce A. Menk, #6293
Alan Epstein, #10473
of HALL & EVANS
Suite 1700
1200 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 628-3300

Attorneys for Defendant

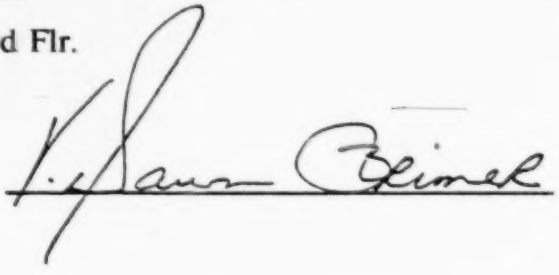
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1988, a true and correct copy of the foregoing NOTIFICATION OF CLAIM OF UNCONSTITUTIONALITY was addressed and forwarded to:

John A. Clifford, Esq. (VIA FEDERAL EXPRESS)
Daniel W. McDonald, Esq.
Alan Carlson, Esq.
Merchant, Gould, Smith, Edell,
Welter & Schmidt, P.A.
1600 Midwest Plaza Bldg.
Minneapolis, MN 55402

David G. Palmer, Esq. (VIA U.S. MAIL)
Gibson, Dunn & Crutcher
1801 California St., #4200
Denver, CO 80202

Attorney General (Certified Mail, Return Receipt Requested)
State of Colorado
1525 Sherman St., 3rd Flr.
Denver, CO 80302



P 298 008 967

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to ATTORNEY GENERAL	
Street and No. 1525 SHERMAN ST., #3rdFlr	
P.O. State and ZIP Code DENVER, CO 80302	
Postage	$ 2.40
Certified Fee	.90
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	.85
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$ 4.15
Postmark or Date 9/29/88 vdb	

PS Form 3800, June 1985

* U.S.G.P.O. 1985-480-794

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
88 OCT 5 P3:11
JAMES R. MANSPEAKER,
CLERK
BY _____ DEP. CLK.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE POST OFFICE,
Plaintiff,
v.
PORTEC, INC., a Delaware corporation,
Defendant.

Civil Action
No. 87-FS-681

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 1988, a true and correct copy of the executed Return Receipt originally forwarded (through the United States Postal Service) to the office of the Attorney General of the State of Colorado regarding Defendant's Notification of Claim of Unconstitutionality has been forwarded by United States Mail, postage prepaid, addressed to John A. Clifford, Esq., Daniel W. McDonald, Esq., Merchant, Gould, Smith, Edell, Welter & Schmidt, P.A., 1600 Midwest Plaza Bldg., Minneapolis, Minnesota 55402 and David G. Palmer, Esq., Gibson, Dunn & Crutcher, 1801 California St., #4200, Denver, Colorado 80202. The original Return Receipt is attached to this original Certificate of Service for filing.

Respectfully submitted,
HALL & EVANS

BRUCE A. MENK - #6293
1200 - 17th Street, #1700
Denver, CO 80202
(303) 628-3300
Attorneys for Defendant
PORTEC, INC.

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS

SENDER INSTRUCTIONS

Print your name, address, and ZIP Code in the space below.

- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

PENALTY FOR PRIVATE USE, $300

RETURN TO

BRUCE A. MENK of HALL & EVANS
(Name of Sender)

1200 - 17th St., #2900
(No. and Street, Apt., Suite, P.O. Box or R.D. No.)

DENVER, CO 80202
(City, State, and ZIP Code)

PS Form 3811, July 1983

● SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☒ Show to whom, date and address of delivery.

2. ☐ Restricted Delivery.

3. Article Addressed to:

Atty.General/State of Colorado
1525 Sherman St., 3rd Flr.
Denver, CO 80302

4. Type of Service:

☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Article Number

P 298 008 967

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature – Addressee

X

6. Signature – Agent

X Pat Reed

7. Date of Delivery OCT 3 -

8. Addressee's Address (ONLY if requested and fee paid)

DENVER, COLORADO SUSM STATION OCT 1988

DOMESTIC RETURN RECEIPT

Exhibit B

Duane Woodard
Attorney General
Charles B. Howe
Chief Deputy Attorney General
Richard H. Forman
Solicitor General

The State of Colorado
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

RECEIVED
OCT - 7 1988
HALL & EVANS

STATE SERVICES BUILDING
1525 Sherman Street
Denver, Colorado 80203
Phone 866-3611 & 866-3621
Fax (303) 866-5001

October 4, 1988

Bruce A. Menk, Esq.
Alan Epstein, Esq.
Hall & Evans
1200 17th St., Suite 1700
Denver, CO 80202

RE: The Post Office v. Portec, Inc., U.S. District Ct., District of Colorado, 87-FS-681

Dear Messrs. Menk & Epstein:

This is to acknowledge receipt of copies of pleadings in the above-captioned action pursuant to Colorado Rules of Civil Procedure, Rule 57(j).

At this time, we do not intend to intervene in this action on the question of the constitutionality of said ordinance or statute. We would, however, be interested in the final ruling of the court on the question of constitutionality. Therefore, we would appreciate your forwarding a final ruling of the court in this matter.

Thank you for your consideration.

Very truly yours,

Richard H. Forman
Solicitor General

REF:dh
EAG053
cc: John A. Clifford, Esq.
Daniel W. McDonald, Esq.
Alan Carlson, Esq.
Merchant, Gould, Smith, Edell,
Welter & Schmidt, P.A.
1600 Midwest Plaza Bldg.
Minneapolis, MN 55402

David G. Palmer, Esq.
Gibson, Dunn & Crutcher
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STATE OF COLORADO
DEPARTMENT OF LAW
OFFICE OF
THE ATTORNEY GENERAL
STATE SERVICES BUILDING
5 SHERMAN STREET — 3RD FLOOR
DENVER, COLORADO 80203

State of Colorado
Official Mail
Penalty for
Private Use

DENVER
OCT - 6 '88
COLO

U S POSTAGE
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6128210

RECEIVED
OCT - 7 1988
HALL & EVANS

Bruce A. Menk, Esq.
Alan Epstein, Esq.
Hall & Evans
1200 17th St., Suite 1[illegible]
Denver, CO 80202